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No. 87-1172

Supreme Court, U.S.
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Supreme Court of the United States

1987 TERM

HARRY BEALE

v.

C. WILLIAM O'NEILL, *et al.*

On Petition for Certiorari from the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS C. WILLIAM O'NEILL AND VORYS, SATER, SEYMOUR AND PEASE IN OPPOSITION TO THE PETITION FOR CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

1. Whether the Supreme Court should grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit dismissing appellant-petitioner's consolidated appeals for lack of subject matter jurisdiction.

II. STATEMENT OF THE CASE

Because respondents C. William O'Neill ("O'Neill") and Vorys, Sater, Seymour and Pease ("Vorys") believe that the Statement of the Case presented in the Petition for Certiorari is not a clear or complete statement of the nature of the proceedings below and the jurisdictional facts reflected in the record below, respondents deem it necessary to set forth this separate Statement of the Case.

A. Proceedings Below

The Petition for Certiorari, which is before this Court from the United States Court of Appeals for the Sixth Circuit, seeks a review of the Sixth Circuit's denial of two consolidated appeals brought by appellant-petitioner Harry Beale ("Petitioner") against respondents C. William O'Neill ("O'Neill") and the law firm of Vorys, Sater, Seymour and Pease ("Vorys"), and the Honorable Joseph P. Kinneary ("Judge Kinneary"), Richard C. Graham ("Graham") and the law firm of Isaac, Brant, Ledman and Becker ("Isaac"). The Sixth Circuit denied the appeals on August 14, 1987, after concluding that the United States District Court for Southern District of Ohio, Eastern Division, had properly dismissed the actions for lack of subject matter jurisdiction. Petitioner then filed this Petition for Certiorari on January 4, 1988, after the Sixth Circuit denied his Motion for Rehearing En Banc on October 16, 1987.

In the consolidated appeals, Petitioner contested the dismissals of *pro se* actions commenced in the District Court on October 7, 1986 (Case No. C-2-86-1201) and on October 20, 1986 (Case No. C-2-86-1309).[1] The actions

[1]The actions were consolidated on appeal by the Sixth Circuit on March 27, 1987, under appeal numbers 87-3152 and 3170.

were identical in terms of the named defendants and counts alleged, except that the first action was brought as a shareholder derivative suit on behalf of Applied Coatings International Delaware ("ACI-Delaware"), and the second action was brought on behalf of Petitioner solely in his individual capacity. In both actions, the counts against respondents O'Neill and Vorys alleged malpractice claims originating from their representation of Petitioner and ACI-Delaware in a prior lawsuit (Case No. C-2-84-1979). O'Neill and Vorys had been permitted to withdraw as counsel in Case No. C-2-84-1979 by order of the District Court on October 25, 1985. The counts against Graham and Isaac alleged "improper influence" in their representation of the opposing party to the lawsuit. As to Judge Kinneary, the counts alleged prejudicial misconduct in ruling against the Petitioner and ACI-Delaware in two preliminary injunction hearings pending in the lawsuit.

On December 30, 1986 O'Neill and Vorys filed dismissal motions in both actions. The other defendants also filed dismissal motions in the actions. The motions were premised upon several grounds, including the lack of subject matter jurisdiction. Thereafter, all counts against Judge Kinneary were dismissed on the grounds of judicial immunity. The District Court entered dispositive judgments as to respondents O'Neill and Vorys and all other named parties on February 6, 1987 and February 13, 1987, dismissing the actions in their entirety for lack of subject matter jurisdiction. In each Memorandum and Order entered, the District Court cited the lack of federal claims and absence of diversity of citizenship among the named parties as the grounds for dismissal.

B. Statement of Facts

As indicated in his own pleadings filed in the actions, Petitioner is an Ohio resident and ACI-Delaware is a Delaware corporation with its principal place of business located in Ohio. The named defendants in each action were respondents O'Neill and Vorys, Graham, Isaac and Judge Kinneary. As indicated in their dismissal motions, respondent O'Neill is an Ohio resident and respondent Vorys has its principal place of business in Columbus, Ohio.

In the derivative action, (C-2-86-1201), Petitioner alleged four counts against the named defendants in various combinations. Count I generally alleged malpractice claims against O'Neill and Vorys in representing Petitioner and ACI-Delaware in a prior lawsuit (Case No. C-2-84-1979) which was still pending before Judge Kinneary in January 1987. Count II averred prejudice by Judge Kinneary in ruling against Petitioner and ACI-Delaware in two preliminary injunction hearings conducted in the pending action (Case No. C-2-84-1979), and further alleged that Judge Kinneary subverted and denied Petitioner's and ACI-Delaware's federal constitutional rights in that action. Count III was brought against Graham and Isaac and alleged that Graham, in acting as opposing counsel in the pending case (Case No. C-2-84-1979), exerted "improper influence" upon Judge Kinneary which contributed further to the alleged prejudice of Judge Kinneary against Petitioner and ACI-Delaware. Count V named all of the above defendants and claimed that a "synergistic phenomena" developed through the alleged incompetence of O'Neill and Vorys, alleged prejudice of Judge Kinneary, and the alleged improper influence by Graham and Isaac, all of

which allegedly contributed to an unfavorable determination of the rights of both Petitioner and ACI-Delaware in the proceedings before Judge Kinneary.

In the second action (C-2-86-1309), brought by Petitioner in his individual capacity, Petitioner alleged the very same counts against the above-named defendants except that each count was modified to reflect an individual claim rather than one belonging to ACI-Delaware. In both actions, Petitioner asserted federal question jurisdiction pursuant to 28 U.S.C. §1331 with respect to all counts against Judge Kinneary. No basis for federal jurisdiction was ever pled with respect to O'Neill and Vorys.

The underlying allegations found in the various counts of these actions stem in part from a previous lawsuit[2] which was commenced on behalf of Petitioner in the District Court on November 15, 1984. O'Neill and Vorys represented Petitioner in that action which sought to enjoin the defendant, Omnimax, Inc. ("Omnimax"), from exercising shareholder rights with respect to shares of ACI-Delaware, and from breaching a certain voting trust agreement pertaining to the disputed shares. Graham and Isaac defended Omnimax in the litigation.

In the *Applied Coatings* action, Petitioner claimed that Omnimax had failed to raise sufficient start-up capital for the formation of an Ohio corporation, ACI-Ohio, in breach of a joint venture agreement previously executed between Petitioner and Omnimax. The joint venture agreement had specified that in return for providing start-up capital, Omnimax would receive a forty-nine percent (49%) ownership in the newly formed corporation. After a

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[2]*Applied Coatings International, Inc., et al. v. Omnimax, et al.*, Civil Action No. C-2-84-1979, Southern District of Ohio, Eastern Division (hereinafter *"Applied Coatings"*).

merger between ACI-Ohio and Red Cliff Energy, Inc. to form ACI-Delaware, the dispute over shareholder rights centered around the ownership in ACI-Delaware, with ACI-Ohio eventually becoming a wholly-owned subsidiary of ACI-Delaware.

On February 12, 1985, Judge Kinneary denied the preliminary injunction sought by Petitioner. Petitioner alleged that O'Neill failed to object to allegedly perjurious testimony[3] during the preliminary injunction hearing and that Judge Kinneary's ruling was based upon prejudice against Petitioner and ACI-Delaware. Furthermore, Petitioner alleged that Graham, in representing Omnimax, exerted improper influence upon Judge Kinneary.

The remaining allegations asserted by Petitioner in these *pro se* actions relate to a preliminary injunction motion brought by Omnimax against Petitioner and ACI-Delaware on May 17, 1985. By that motion, Omnimax sought to enjoin implementation of certain corporate resolutions of the ACI-Delaware board of directors, including but not limited to, the issuance of new shares which allegedly interfered with a proxy solicitation by Omnimax.

On October 1, 1985, Judge Kinneary granted a preliminary injunction in favor of Omnimax. Again, Petitioner alleged that O'Neill and Vorys' incompetence, Judge Kinneary's judicial misconduct and Graham and Isaac's improper influence all tainted the evidentiary hearing upon which the preliminary injunction was granted. This case continued before Judge Kinneary and was tried to a jury in the fall of 1987.

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[3]As set forth in various pleadings filed by petitioner in the District Court and Court of Appeals, the claim of perjurious testimony is anti-Semetic and is based solely upon the fact that testimony was given by jews.

On the pending appeal, the District Court dismissed the derivative action as to Judge Kinneary on January 16, 1987, citing the doctrine of judicial immunity. Thereafter, on February 13, 1987, the Court dismissed the entire action indicating in its Memorandum and Order that Petitioner had failed to establish subject matter jurisdiction as to the malpractice claims asserted against O'Neill and Vorys and as to the claims asserted against Graham and Isaac. The Court further noted that, as an alternative ground for dismissal, Petitioner's claims were an impermissible collateral attack upon the decisions rendered by Judge Kinneary in the *Applied Coatings* action. The Court then declined to exercise pendent jurisdiction over these claims.

As to the individual action, The District Court dismissed the entire action on January 26, 1987, again citing the doctrine of judicial immunity as to Judge Kinneary, and the lack of federal jurisdiction over the state law claims asserted against the remaining defendants.

On February 23, 1987, Petitioner filed notices of appeal with the Sixth Circuit contesting these dismissals. Thereafter, the appeals were consolidated by Order of the Sixth Circuit on March 27, 1987. Finally, on August 17, 1987, the Sixth Circuit denied the consolidated appeals and affirmed the judgments of the District Court dismissing the actions for lack of federal subject matter jurisdiction.

In its Order affirming the District Court's dismissals, the Sixth Circuit found that the District Court had properly dismissed the actions for the lack of diversity of citizenship between the parties and the absence of federal claims not barred by judicial immunity. The Sixth Circuit also noted that, in substance, the actions amounted to

nothing more than an improper attempt by Petitioner to collaterally attack the aforementioned preliminary injunction orders issued by Judge Kinneary in the *Applied Coatings* action (Case No. C-2-84-1979).

III. SUMMARY OF ARGUMENT

Petitioner has failed to present any credible reason why this Court should grant certiorari to review the Sixth Circuit's affirmance of the District Court dismissal of the two *pro se* actions. The simple and uncontroverted jurisdictional facts involved in these appeals are well documented in the record. Moreover, as indicated in its Order denying the appeals, the Sixth Circuit based its decision upon the most simple and straight forward applications of elementary principles of federal jurisdiction.

Petitioner, ACI-Delaware, O'Neill and Vorys are all Ohio citizens for purposes of determining diversity of citizenship jurisdiction pursuant to 28 U.S.C. §1332. Petitioner's only arguable federal claims were asserted against Judge Kinneary and were barred by the complete defense of judicial immunity. For these reasons, the Sixth Circuit affirmed the District Court's dismissals for lack of federal subject matter jurisdiction.

In his Petition for Certiorari, Petitioner has failed to articulate any of the grounds enumerated under Supreme Court Rule 17, or for that matter, any other conceivable grounds that would compel this Court to review the Sixth Circuit's denial of these appeals. A review of these frivolous appeals is, by definition, neither necessary to maintain uniformity of decisions among the federal courts of appeals, nor required to decide an important federal question.

Accordingly, the Court should deny this Petition for Certiorari.

IV. ARGUMENT

The Sixth Circuit properly denied Petitioner's appeals and affirmed the judgments of the District Court dismissing the actions for the obvious lack of subject matter jurisdiction. Petitioner has repeatedly demonstrated in both his pleadings filed in the District Court actions and his briefs submitted to the Sixth Circuit, that no diversity of citizenship existed between Petitioner and respondents O'Neill and Vorys. Petitioner is an Ohio resident and ACI-Delaware has its principal place of business in Ohio. Accordingly, Petitioner and ACI-Delaware are citizens of Ohio for purposes of determining diversity of citizenship jurisdiction pursuant to 28 U.S.C. §1332.

Similarly, O'Neill and Vorys are Ohio citizens for purposes of determining diversity jurisdiction. O'Neill is a resident of Ohio, Vorys has its principal place of business in Ohio and each of the Vorys' partners at this location, including O'Neill, are members of the Bar of the State of Ohio and residents of the State of Ohio. Thus, Petitioner cannot assert that the Sixth Circuit committed an error in affirming the District Court's dismissals on the jurisdictional basis of diversity of citizenship. 28 U.S.C. §1332.

As to the substance of the claims asserted against O'Neill and Vorys, the Sixth Circuit correctly found that Petitioner's claims were for legal malpractice allegedly committed by respondents in their prior representation of Petitioner in the *Applied Coatings* action.[4] The Court ruled that these malpractice claims purely involved matters of

[4]Indeed in his pleadings, Petitioner, himself, conceded that the claims against O'Neill and Vorys were for simple malpractice.

state law and, as such, could in no way provide Petitioner with an independent basis for invoking federal jurisdiction against respondents O'Neill and Vorys. *See Lones v. Detroit, T. & I.R. Co.,* 398 F.2d 914 (6th Cir. 1968) (in affirming entry of jury verdict, court applied Ohio law of negligence), *cert. den.,* 313 U.S. 1063 (1969). Without the presence of a federal claim against O'Neill and Vorys, the Sixth Circuit property concluded that the District Court had no independent basis for asserting federal jurisdiction over the entire claims brought against O'Neill and Vorys.

The Sixth Circuit also affirmed the District Court's refusal to exercise pendent jurisdiction over the state law claims asserted against O'Neill and Vorys. The only basis for subject matter jurisdiction asserted by Petitioner pertained to the claims brought against Judge Kinneary. These claims were dismissed by the District Court on the ground that they failed to state a cause of action upon which relief could be granted, since they were barred by the complete defense of judicial immunity. This finding was affirmed by the Sixth Circuit, citing *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, (1978), and ruling that Judge Kinneary was "cloaked with judicial immunity".

As a result, the Sixth Circuit left undisturbed the District Court's decision to refrain from exercising pendent jurisdiction over the remaining state law claims against respondents O'Neill and Vorys on the ground that the absence of a substantial federal claim necessitated a dismissal of the remaining state claims. In doing so, the Sixth Circuit reaffirmed legal principles well supported by the great weight of authority. *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, (1966); *Gibson v. First Federal Savings and Loan Association,* 504 F.2d 826 (6th Cir. 1974); *Kurz v. Michigan,* 548 F.2d 172 (6th Cir. 1977), *cert.*

den., 434 U.S. 972 (1977), *reh. den.*, 434 U.S. 1089 (1980); *Province v. Cleveland Press Publishing Co.*, 787 F.2d 1047 (6th Cir. 1986); *Service, Hospital, Nursing Home and Public Employees Union v. Commercial Property Services*, 755 F.2d 499 (6th Cir. 1985), *cert. den.*, 474 U.S. 850 (1985).

Thus, the Sixth Circuit correctly affirmed the District Court's refusal to exercise pendent jurisdiction over the state law claims brought against respondents O'Neill and Vorys.[5] In addition, it is also well settled that a federal court can only assert pendent jurisdiction over related *claims* between the same parties to the original federal claim. There is no basis for the exercise of federal jurisdiction over other parties who are not defendants in the federal claims asserted. *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413 (1976) (affirming dismissal of state law claims against defendants with respect to whom no federal claim was asserted). Because no claim under §1331 is alleged against O'Neill and Vorys and because pendent party jurisdiction does not exist, there remains no conceivable basis on which the Sixth Circuit could have erred in affirming the District Court's exercise of discretion in declining to exercise pendent jurisdiction over the malpractice claims against O'Neill and Vorys.

In light of the foregoing, and in view of the considerations found in Supreme Court Rule 17 governing review on certiorari, it is abundantly clear that this Court's review of the Sixth Circuit's denial of these patently frivolous

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[5]As asserted by O'Neill and Vorys in their brief filed with the Sixth Circuit, in the event that this Court should find that the Sixth Circuit erred in affirming the District Court's dismissal of the federal claims asserted against Judge Kinneary, and thereby conclude that subject matter jurisdiction was present as to those federal claims, there is still no basis for asserting jurisdiction over the state claims brought against O'Neill and Vorys.

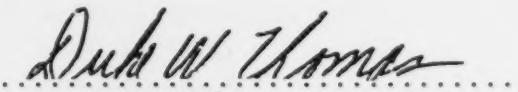
appeals is not merited. The denial of these frivolous appeals does not leave unresolved a conflict of decisions among the federal courts of appeals nor an important question of federal law.

Petitioner has failed to present any reason—compelling or otherwise—why this Court should grant certiorari. Petitioner has also neglected to comply with the form and content requirements for filing a Petition for Certiorari, listed under Supreme Court Rule 21. The Petition for Certiorari does not contain a clear, accurate or brief statement of the case, nor does it even attempt to summarize the proceedings below and the grounds upon which Petitioner is asking this Court to grant certiorari. For the most part, the Petition does not, in any meaningful way, address the issue of whether the denial of these appeals merits a review by this Court. For all of these reasons, this Court should deny the Petition for Certiorari.

V. CONCLUSION

The record of the proceedings below conclusively demonstrates the lack of federal jurisdiction over the claims asserted against respondents O'Neill and Vorys. No diversity of citizenship exists between Petitioner and O'Neill and Vorys, and only state law malpractice claims are alleged. Accordingly, a review of the Sixth Circuit's denial of these appeals for lack of subject matter jurisdiction is not warranted by this Court. For all of the foregoing reasons, this Court should deny the Petition for Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of Respondents C. William O'Neill and Vorys, Sater, Seymour and Pease in Opposition to the Petition for Certiorari has been served upon the following parties and counsel by U.S. Mail, postage prepaid, this 1st day of February, 1988.

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